U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 21 2007

EAC 06 062 52135

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food importer/distributor. It seeks to employ the beneficiary permanently in the United States as an Asian market analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.

On appeal, counsel asserts that the regulatory requirement supporting the director's conclusion does not derive from the statute and, thus, is *ultra vires*.[1] For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4).

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

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[1] On appeal, counsel stated that he would submit a brief and/or additional evidence to the AAO within 30 days. Counsel has since advised this office that no additional materials were submitted. Thus, the initial submission, which includes substantive arguments, constitutes the entire appeal.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750[2] in duplicate must accompany the petition. **The job offer portion of the individual labor certification**, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.) While the director failed to cite this regulation, it provides the legal basis for her ultimate conclusion.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a baccalaureate degree is the minimum level of education required. On Lines 6 and 10, the petitioner indicated that the job also required 12 months of experience in either the job offered or in one of the specified alternate occupations. Line 8 reflects that no combination of education or experience is acceptable in the alternative.

Citizenship and Immigration Services (CIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). CIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In response to the director's inquiry as to whether the petitioner wished to seek a lesser classification and again on appeal, counsel asserts that the regulation at 8 C.F.R. § 204.5(k)(4) is *ultra vires* as it does not follow from the statute. Counsel references an opinion provided in Devine, Robert;

[2] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

Chisam, Blake, *Immigration Practice* 15-35 (2005) and the court's decision in *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

Thus, the AAO is not bound by an opinion expressed in an immigration law handbook that a regulation is vulnerable to an *ultra vires* challenge. In addition, *Morales-Izquierdo v. Ashcroft*, 388 F.3d at 1299, involved a regulation interpreting a statute relating to reinstatement of a deportation order. In that matter, the court found that Congress had clearly expressed its intention that an immigration judge decide issues of admissibility and deportability. *Id.* at 1304-05. Thus, since these same issues were involved in the reinstatement decision, a regulation allowing an immigration officer to reinstate an order of deportation was *ultra vires*. *Id.* As *Morales-Izquierdo* did not address the regulation at issue, 8 C.F.R. § 204.5(k)(4), it has no relevance to the matter before us.

Even if the AAO had the authority to invalidate or void a regulation, and counsel has not established that the AAO has such authority,[3] we are not persuaded that 8 C.F.R. § 204.5(k)(4) contradicts congressional intent. First, the Act was enacted to address the need for "highly skilled, specially trained personnel *to fill increasingly sophisticated jobs*." H.R. Rep. No. 101-723, 41 (September 19, 1990). Congress expressed no intention to grant higher preference status based on the alien's qualifications alone; rather the nature of the job is integral to the classification sought.

Furthermore, in 2000, Congress passed the American Competitiveness in the Twenty-First Century Act (AC21), Pub. L. No. 106-313, 114 Stat. 1251 (Oct. 17, 2000), amending section 204 of the Act to include the current section 204(j) of the Act. This new provision, enacted ten years after the legacy Immigration and Naturalization Service (now Citizenship and Immigration Services) finalized the regulation at 8 C.F.R. § 204.5(k)(4)(i), provides for the continuing validity of a petition if the alien changes job or employers "if the new job is in the same or a similar occupational classification as the job for which the petition was filed." Congress is presumed to be aware of an administrative interpretation of a statute and incorporates that interpretation when it enacts a new statute insofar as the administrative interpretation affects the new statute. *Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978). It is clear from the language in section 204(j) of the Act that Congress agreed that, in addition to the alien's qualifications, the nature of the job being offered is an integral

[3] All of counsel's examples of regulations that conflict with statutes being struck down are examples of court action.

part of what makes the petition valid. Thus, the requirement that the job actually require a member of the professions holding an advanced degree is not inconsistent with Congressional intent.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

This denial is without prejudice to the filing of a new petition under a lesser classification.

ORDER: The appeal is dismissed.